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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/643,244

08/18/2003

Stephen John Dyks

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UNILEVER PATENT GROUP
800 SYLVAN AVENUE
AG West S. Wing
ENGLEWOOD CLIFFS, NJ 07632-3100

EXAMINER

BEKKER, KELLY JO

ART UNIT

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1794

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/643,244	Applicant(s) DYKS ET AL.	
	Examiner Kelly Bekker	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Amendments made 9/08/08 have been entered.
Claims 1-13 remain pending.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 8, 2008 has been entered.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 103(a) rejection of claims 1-13 as being unpatentable over OLS (German 3417196 A1) in view of Hui (ed.) (Dairy Science and Technology Handbook) and Ezaki (JP App # 60230711) has been withdrawn. Specifically, the rejection has been withdrawn as the primary reference, OLS (abstract), teaches "the extrudate is only extruded at the instant the mould closes or into an already closed mould", thus one would not have been motivated for the extrudate to be extruded and expand into an open mould.

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over) Ezaki (JP App # 60230711) in view of Hui (ed.) (Dairy Science and Technology Handbook).

Ezaki discloses of a method for producing a molded ice cream product, i.e. an aerated confection, comprising;

- a. Providing two separate forming elements,
- b. Providing at least one open cavity on a surface of each forming element,
- c. Providing filling devices for filling said cavities

- d. Filling two cavities, one on each forming element

Where in:

- i. The two cavities are moved opposite one another and the frozen aerated product in each cavity is pressed against the frozen aerated product of the other cavity

Ezaki teaches that the two separate forming elements are a pair of rollers wherein each roller has a multiplicity of open cavities on the surface, and the rollers counter rotate so that the respective cavities in the two forming elements lie opposite one another and the frozen aerated products of each cavity are pushed toward one another. Ezaki teaches that the filling device has an output for each forming element. Refer specifically to Figure 1, Page 2 lines 19-24, page 4 line 15 through page 5 line 11. Ezaki teaches that the product has a temperature of -7C when filled into the open cavities (translation page 8, lines 24-25).

Specifically regarding the product as expanded outside the filling cavity, when referring to Figure 1, Ezaki teaches that there is a space between the sliding surface and the mold cavities (Page 4 lines 15-20), thus teaching that there is space to allow the confection to expand outside the open cavity. Ezaki teaches that the confection fills not only the depressions or molds (Figure 1, 17 and 8), but also the grooves (Figure 1, 26b). Refer specifically to page 9 lines 11-15. Thus, Ezaki teaches that the frozen confection, which includes ice cream, is outside the open cavity prior to the open cavities moving towards one another and closing as recited in claim 1, c and claim 13, c. Applicant claims a frozen aerated confection and discloses ice cream as the frozen aerated confection in the specification; applicant claims that the confection is "allowed" to expand and does not require any steps to provoke or excite the expansion; thus, it would be an inherent property of the confection or ice cream to expand when allowed. Since Ezaki teaches of substantially the same type of confection, i.e. an ice cream, as instantly claimed by applicant and teaches that there is sufficient space for the confection to expand, one of ordinary skill in the art at the time the invention was made would expect the confection as taught by Ezaki to expand outside its open cavity as instantly claimed absent any clear and convincing arguments and/or evidence to the

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contrary. Applicant is reminded that where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Ezaki is silent to the overrun of the frozen confection as recited in claims 1 and 13, to the molds rotated at variable rotational speeds as recited in claim 4, and to the location of the molds at the minimum and maximum rotational speed of the mold as recited in claims 5-10.

Hui discloses of novelty equipment utilized for ice creams. Hui teaches that the sales performance of novelties has been and continues to be strong. Hui teaches the process of filling molds with expanded ice cream products (i.e. ice cream with overrun) is performed at high speeds. Hui teaches that with molding, a pump arrangement is included. Hui teaches that when pumping it is effective to produce a product that melts more slowly and retains more overrun. Hui teaches of a savings for a 2.75 fluid ounce bar (i.e. mould) at a 65% overrun. Refer specifically to Pages 251 and 252.

Regarding the overrun rate, it would have been obvious to one skilled in the art at the time the invention was made to include an overrun of 65% since Hui teaches that overrun ice cream products which are molded and extruded at 65% increase the amount of the final product (or save a portion of the product that could be lost). To select a particular percentage of overrun would have been obvious depending on the particular degree of savings desired.

Regarding the rotation speed of the rollers, specifically variable rotational speeds and the rotational speed of the rollers at a stop when the filling device is over a mold cavity and two filled mold cavities face each other, and at a maximal value when the filling device is between two mold cavities, it would have been obvious to one of ordinary skill in the art at the time the invention was made to stop the rollers, i.e. to be at

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a minimal rotational value, at the same time when the filling device is over a mold cavity and two filled mold cavities face each other so that the mold cavities could be properly filled (i.e. without spillage, to the correct level, ect) and so that the frozen confection material within the mold cavities can solidify and expand to take the shape of the mold cavity. It would have been obvious to one of ordinary skill in the art at the time the invention was made for the maximal rotational value of the rollers to be when the filling device is between two mold cavities, in order to expedite the processing, such that there is minimal lag time between the fillings. One would have been further motivated to vary the rotation speeds depending on the desired degree of filling and pressure in the molding cavity. To do so would be routine practice of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-13 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as not patentably distinct from claims 1, 2, and 4 of

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commonly assigned copending Application No. 11/891,208 ('208). Although the conflicting claims are not identical, they are not patentably distinct from each other because both are directed towards a process of manufacturing frozen aerated products comprising providing two separate forming elements with forming cavities, filling the two open cavities with a product having an overrun within the range 30-130%, allowing the product to expand outside the cavity, then moving the two open cavities opposite one another so that the product of one cavity is pressed against the product of the other cavity. The only difference is '208 does not teach the temperature at which the product is when filled into the cavities or the rotation of the rollers and the instant application does not teach a stick placed within the frozen cavities.

Regarding the temperature at which the product was filled into the cavities, it was known in the art at the time the invention was made for frozen confections to be filled at about -7C. It would have been obvious to one of ordinary skill in the art at the time the invention was made to fill the frozen product into the mold at a temperature that would allow the product to be molded, i.e. would not be too stiff or frozen, but at which the product would not melt. To do so would be routine determination of one of ordinary skill in the art at the time the invention was made and would be a result effective variable based upon the composition of the confection and would not impart a patentable distinction to the claims.

Regarding the rotation speed of the rollers, specifically variable rotational speeds and the rotational speed of the rollers at a stop when the filling device is over a mold cavity and two filled mold cavities face each other, and at a maximal value when the filling device is between two mold cavities, it would have been obvious to one of ordinary skill in the art at the time the invention was made to stop the rollers, i.e. to be at a minimal rotational value, at the same time when the filling device is over a mold cavity and two filled mold cavities face each other so that the mold cavities could be properly filled (i.e. without spillage, to the correct level, ect) and so that the frozen confection material within the mold cavities can solidify and expand to take the shape of the mold cavity. It would have been obvious to one of ordinary skill in the art at the time the invention was made for the maximal rotational value of the rollers to be when the filling

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device is between two mold cavities, in order to expedite the processing, such that there is minimal lag time between the fillings. One would have been further motivated to vary the rotation speeds depending on the desired degree of filling and pressure in the molding cavity. To do so would be routine practice of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims absent any clear and convincing arguments and/or evidence to the contrary.

Regarding a stick placed within the frozen cavities, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a stick in the cavities and thus the frozen confection so that the stick could be securely molded into the confection and the confection could be held without dirtying the consumers hands. To do so would be within the ordinary ingenuity of one of ordinary skill in the art at the time the invention was made and would not impart a patentable distinction to the claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

Applicant's arguments with respect to claims 1-13 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Bekker/
Examiner
Art Unit 1794